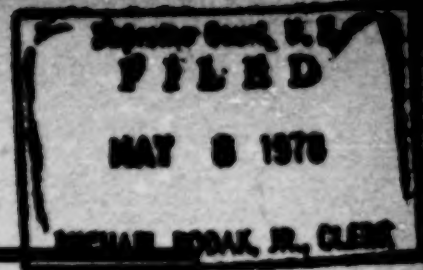


77-1597



Supreme Court of the United States.

MAY TERM, 1978.

JOSEPH T. AND MARIE T. GELINAS,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit.**

**JOHN W. SPILLANE, ESQUIRE,
390 Main Street,
Worcester, Massachusetts 01608.**

Table of Contents.

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of Case	3
Reasons for Allowance of the Writ	4
Conclusion	8
Appendix:	9
A Opinion of the United States Court of Appeals for the First Circuit, dated January, 1978	9
B Amended Opinion of the United States Court of Appeals for the First Circuit, dated February, 1978	16
C Opinion of the Tax Court, March, 1975	18
D Sur Memorandum Opinion of Tax Court, dated March, 1977	26
E Decision of the Tax Court, 1977	31
F Environmental Stop Order, 1971	32
G Massachusetts Superior Court Decision, 1972	34
H Internal Revenue Code of 1954 (26 U.S.C.) § 1034, and Regulations	35
I Massachusetts General Laws c. 130, § 27A; Acts and Resolves of Massachusetts 1972, Chapter 784, Section 2	37

Table of Authorities Cited.

CASES.

Buzzell, Paul, 26 T.C.M. 481 (1967)	6n.
Elam v. C.I.R., 58 T.C. 238 (1972), aff'd per curiam 477 F. 2d 1333 (6th Cir. 1973)	5n.

Henzel, Richard W., 24 T.C.M. 1344 (1965)	6n.
Rolberge v. C.I.R., 377 F. 2d 558 (9th Cir. 1967), cert. denied 389 U.S. 1037 (1968)	5n.
United States v. Sheahan, 323 F. 2d 383 (5th Cir. 1963)	5n.

STATUTES.

26 U.S.C. (Internal Revenue Code of 1954) § 1034	1, 2,
§ 7482(a)	3, 4, 5, 6, 7, 8, 35-36
28 U.S.C. § 1254	5
Massachusetts General Laws c. 130, § 27A	2
Acts and Resolves of Massachusetts 1972, Chapter 784, Section 2	6n., 37-38
	6n., 38

MISCELLANEOUS.

Treasury Regulation § 1.1034	7, 36
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JOSEPH T. AND MARIE T. GELINAS,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit.

The Petitioners hereby petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit affirming the decision of the United States Tax Court denying the Petitioners to defer the gain realized on the sale of their principal residence under § 1034, I.R.C. of 1954.¹

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is reproduced herein as Appendix A, Pages 9-15. That opinion has not been officially reported as of the date of this Petition.

¹ All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise noted.

The opinion of the United States Tax Court in which Court this case arose is reproduced herein as Appendix B, Pages 16-17. That opinion has been officially reported and appears as J. T. Gelinas, 35 TCM 448, Dec. 33 744 M. TC Memo 1976-103. The Tax Court issued a further decision, denying Petitioners' motion to reopen the record in a memorandum sur order and order dated March 16, 1977.

Jurisdiction.

The judgment sought to be reviewed was entered February 6, 1978 in the United States Court of Appeals for the First Circuit.

Jurisdiction to review the judgment is conferred on this Court by 62 Stat. 928, 28 U.S.C. § 1254(1), which provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

Questions Presented.

1. Did the Court of Appeals err in upholding the decision of the Tax Court denying the Petitioners nonrecognition of capital gain treatment under Code § 1034 for the construction and/or reconstruction of the Petitioners' new residence, delayed by an eleven-month environmental stop order illegally issued by an agency of the Commonwealth of Massachusetts, which order was ultimately dismissed by the Massachusetts Superior Court, preventing the Petitioners from reconstructing and reoccupying their new house within the prescribed eighteen-month period

from the date of the sale of their old home under the said Code § 1034?

2. Did the Court of Appeals err in upholding the decision of the Tax Court denying the Petitioners nonrecognition of capital gain treatment under Code § 1034 when the Petitioners purchased a new home fully furnished with all utilities connected within several days of the sale of an older home, and the occupation of the new home as the principal residence, and the subsequent reconstruction of the second home and reoccupation of the second home as a principal residence beyond the statutory period prescribed under Code § 1034?

Statement of Case.

The Petitioners are Joseph T. and Marie Gelinas, taxpayers living in Hyannis, Massachusetts. Respondent is the Commissioner of Internal Revenue Service.

Petitioners sold their home in Hyannis, Massachusetts, on June 7, 1971 and bought another home nearby in Hyannis the next day. Petitioner Joseph T. Gelinas moved into the premises and occupied it as his principal residence immediately. His wife visited the new house daily, but remained at their old house as a caretaker for the seller for nine months. Petitioners then began to reconstruct their new house, but were prevented from doing so on September 30, 1971 by a stop order issued by the Director of Marine Fisheries, (*infra*, Appendix F), because the residence was being reconstructed a little closer to the shoreline and was incorporating a seawall. The Petitioners purchased another home in Hyannis on March 24, 1972 for their daughter and her large family, and lived there with them for a short time.

After a trial, the Superior Court held in favor of the Petitioners and the stop order was removed after being

in force for eleven months (*infra*, Appendix G). The Petitioners completed the reconstruction of their new house by May of 1973 and reoccupied the premises as their principal residence. However, on December 5, 1972 Petitioners had not completed the reconstructed residence which marked the eighteenth month period from the date of the sale of the old house, but they were committed to the final cost of the reconstruction of the said new principal residence.

Reasons for Allowance of the Writ.

The case at bar is one of first impression in which the Petitioners argue in the alternative that an illegal stop order issued by an environmental enforcement agency of the Commonwealth of Massachusetts, and subsequently dismissed by the Superior Court eleven months later, legally prevented the Petitioners from obtaining nonrecognition of gain tax treatment under Code § 1034 in the sale of their former residence, *or* that the Petitioners *did* comply with Code § 1034, because Petitioner Joseph T. Gelinas occupied the new residence within a day of the sale of the old residence as his principal residence, and then reconstructed the new residence, committing himself and his wife to the entire cost of the reconstructed house within the period prescribed at the time by Code § 1034.

The Congress has extended the time period in which the taxpayer may purchase a subsequent principal residence and thereby defer gain from one year to eighteen months (before or after the sale), and the Congress has also extended the period in which a taxpayer may construct or reconstruct a subsequent residence from eighteen months to twenty-four months (if construction begins within eighteen months after the sale of the former residence) (P.L. 94-12). Passage of this act took place after the facts developed in this case.

This action arose on March 3, 1975 in the United States Tax Court when the Petitioners requested a redetermination of the deficiency set forth by the Commissioner in his notice of deficiency dated December 11, 1974 in the amount of \$36,288.43. Petitioners were not represented by counsel. No waiver of counsel was filed nor requested to be filed for the Petitioners. Stipulations of Facts prepared by Commissioner's counsel were filed. The Tax Court's memorandum findings of fact and opinion which are reported at 35 T.C.M. 448 (1976) were filed on March 31, 1976. On September 27, 1977, Petitioners were granted leave to file a motion to reopen the record out of time. After a hearing held on January 12, 1977 in Washington, D.C., the Tax Court denied the Petitioners' motion to reopen the record in a memorandum sur order and order dated March 16, 1977. The Tax Court's decision was entered on May 6, 1977. Petitioners' timely notice of appeal was filed with the United States Court of Appeals for the First Circuit on July 29, 1977.

Jurisdiction is conferred on the United States Circuit Court of Appeals by § 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

On January 3, 1978 after a hearing, the said Court affirmed the decision of the Tax Court. After Petitioners filed their petition for rehearing, which was denied, the Court of Appeals corrected its decision of January 3, 1978 by decree dated February 6, 1978.

Although the Circuit Court of Appeals has considered only several Code § 1034 cases,² and this Court has not interpreted this important tax section,³ this Court should

² *United States v. Sheahan*, 323 F. 2d 383 (5th Cir. 1963). *Elam v. C.I.R.*, 58 T.C. 238 (1972), *aff'd per curiam* 477 F. 2d 1333 (6th Cir. 1973). See case under footnote 3.

³ *Rolberge v. C.I.R.*, 377 F. 2d 558 (9th Cir. 1967), *cert. denied* 389 U.S. 1037 (1968).

now consider the whole section in light of the extraordinary facts of this case and the recent amendments to the law for the following reasons:

1. An important element in the stimulation of our national economy involves the creation of new housing units and the encouragement, preservation and free transferability of existing family units. The enactment of Code § 1034 (*infra*, Appendix H) and as most recently amended after the facts of this case by the Congress, is an important economic tool which every home-owning American family must employ in making continued home ownership possible.
2. The wave of well-meaning, but sometimes impractical, environmental laws enacted across the country in the States and by the Congress has, in some instances, created serious inequities in the family home and building market. This case involves such a law⁴ and the imposition of an illegal environmental stop order based on that law which, until lifted, prevented the Petitioners from completing their new home. Previous lower court decisions, in which circumstances making compliance difficult under Code § 1034, have not favored the taxpayer. However, in this case the circumstances preventing compliance were not illness or bad weather,⁵ but rather a court order based upon a State law that was repealed by the Massachusetts General Court⁶ at the time the stop order was lifted by the Massachusetts Superior Court.

⁴ Massachusetts General Laws c. 130, § 27A (repealed by c. 784 of the Acts of 1972, Section 2) (*infra*, Appendix I).

⁵ Richard W. Henzel, 24 T.C.M. 1344 (1965); Paul Buzzell, 26 T.C.M. 481 (1967).

⁶ Massachusetts General Laws c. 784 of the Acts of 1972, Section 2, repealed Massachusetts General Laws c. 130, § 27A.

3. Petitioners here also urge in the alternative that they did, in fact, comply with Code § 1034, because one of the Petitioners occupied and lived in the new home as his principal residence within days after the sale of the old home. Thereafter, under Code § 1034(a) and Treasury Reg. § 1.1034-1 (b)(7), (*infra*, Appendix H), the Petitioners included in the cost of purchasing the new residence all amounts attributable to construction and reconstruction and improvements to the new home. Petitioners contend that all original and reconstruction costs and improvements constituting capital expenditures were made and/or committed during the period, namely eighteen months from the date of the sale of Petitioners' old residence, or by December 5, 1972.
 4. The good faith of the taxpayer and a dependence on all facts and circumstances in the case are key factors in Treasury Reg. § 1.1034-1(c)(3) (*infra*, Appendix H). In dealing with the purchase of a home for the Petitioners' daughter and her large family following the sale of the old home and the purchase and improvement of the new home, the Tax Court was careful not to consider the daughter's home as *principal residence* of the Petitioners, because of the provisions of Treasury Reg. § 1.1034-1(c)(3) (*infra*, Appendix H). However, the Court of Appeals erred in determining this home to be the principal residence of the Petitioners, thus completely ignoring all the facts of the case and in particular the *good faith* of the Petitioners.
- For the aforementioned reasons, this case has the salient facts to afford this Court, for the first time, an opportunity to thoroughly examine and interpret Code § 1034 and its predecessor section (§ 112(n) of the Internal Revenue

Code of 1939) over almost a forty-year period, particularly in light of some three Congressional changes and lower Court Code § 1034 interpretations (*infra*, Appendix H).

This Court should from time to time examine certain tax sections which have utility and application to great masses of Americans in an effort to determine that Congressional intent is being carried out by the Commissioner, the Tax Court and Court of Appeals. This case involving the tax consequences of the family home, is so indigenous to the American way of life that this Court should not turn away from its busy calendar a thorough review of Code § 1034 as it impacts on the facts of this case.

Conclusion.

For the reasons stated, it is respectfully prayed that this petition for a writ of certiorari be granted, and that the decision of the Court of Appeals be reversed and that the judgment and order of the Tax Court be vacated.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1398

JOSEPH T. AND MARIE T. GELINAS,
Appellants,
v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPEAL FROM THE UNITED STATES TAX COURT

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*
BOWNES, *Circuit Judge*

John W. Spillane for appellants.

Timothy B. McBride, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews*, And *Leonard J. Henzke, Jr.*, Attorneys, Tax Division, Department of Justice, were on brief, for appellee

January 3, 1978

BOWNES, *Circuit Judge*. This is an appeal from a decision of the United States Tax Court assessing a deficiency of \$36,288.43. 35 T.C.M. 448 (1976).

The issue is whether taxpayers, husband and wife, were entitled to nonrecognition treatment of a portion of the gain realized on the sale of their principal residence pursuant to the applicable section of the Internal Revenue Code, 26 U.S.C. § 1034.

Taxpayers do not dispute the fact that they did not occupy their new residence within eighteen months of the sale of their old one, which is a prerequisite under the Code for nonrecognition treatment, but claim that the facts peculiar to their situation require an equitable abridgement of the eighteen month statutory period. They also claim that their new house became their principal residence because it was occupied for approximately six weeks by Joseph Gelinas starting immediately after the sale of their old residence.

Petitioners had not been represented by an attorney before or during the tax court proceeding, but, thereafter, they did obtain counsel. A motion to reopen their case was denied by the tax court on the grounds that "the conclusion . . . reached (by the tax court) would not be changed if the record were reopened to permit petitioners to establish the facts . . . recited."

The stipulated facts and the facts alleged in the petitioners' motion to reopen are summarized below.

Petitioners formerly resided in Hyannis, Massachusetts, at Lewis Bay. On June 7, 1971, they sold their Lewis Bay property, consisting of a motel, a boat landing, and a personal residence, to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. Of the \$1,200,000 received for the entire property, \$160,000 was the allocable amount realized for their personal residence which had been their home since 1961. The adjusted basis on the residence at the time of sale was \$25,200, and \$7,760.80 was allocated as expenses relating to the sale of the home.

On June 7, 1971, the same day as the sale of their old residence, taxpayers purchased property on Harbor Bluff Road in Hyannis for \$44,000, consisting of a house and real estate. It was petitioner's intention to remodel and reconstruct the Harbor Bluff house as their principal residence. Mr. Gelinas visited the new house daily from June 7 to July 15 so as to work on the reconstruction design. In the evenings, he returned to his Lewis Bay home which taxpayers had occupied pending reconstruction of the Harbor Bluff house. Due to a contractor's error during reconstruction, the Harbor Bluff house had to be totally demolished; this was accomplished on July 15, 1971. Taxpayers resided at their old residence on Lewis Bay until March 24, 197[2], when they moved into a house on Blackberry Lane in Hyannis which they had purchased for their daughter at a total cost of \$51,509.11.

The attempted construction of a seawall for the Harbor Bluff property precipitated a stop order by the Director of Marine Fisheries, Department of Natural Resources of Massachusetts, on September 30, 1971. The stop order prevented any further work on the proposed new house as well as the seawall and continued in effect until August 28, 1972. Construction was resumed on September 5, 1972. Taxpayers intended and made plans to complete construction of the house by December 5, 1972, but they were not able to move in until May 31, 1973. The eighteen month statutory period had, of course, expired on December [5], 1972. The final cost of the Harbor Bluff house was \$165,000.

Taxpayers, as required, filed a Form 2119 with their income tax return for 1971 which showed the selling price of their old residence as \$160,000, a cost basis for the old residence of \$25,200, and a gain from the sale amounting to \$134,800. They reported the cost of their new residence as \$165,000 and no amount of the gain as taxable.

It was, and is, their position that all the gain could be deferred pursuant to Section 1034 of the Internal Revenue Code, 26 U.S.C. § 1034.

The Commissioner determined that gain in the amount of \$50,415.05 on the sale of taxpayers' old residence could not be deferred because the petitioners' had not occupied their new residence within the required eighteen months from the date of the sale of their old residence. Part of the total gain was deferred because of taxpayers' purchase of the Blackberry Lane residence which they did occupy within the required time. The tax court adopted the Commissioner's reasoning.

Section 1034 of the Internal Revenue Code, 26 U.S.C. § 1034, provides an exception to the general rule that the entire amount of gain from the sale of property is taxable as ordinary income.¹ The pertinent parts of the Code in effect during the applicable period were:

(a) *Nonrecognition of gain.*—If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

• • •

¹ Section 1034 has since been amended to permit a period of eighteen months with regard to 1034(a) and a period of two years relative to 1034(e)(5).

(c) *Rules for application of section.*

• • •

(2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer's cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).

• • •

(4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his principal residence at some time within 1 year after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence.

(5) In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of sale of the old residence, the period specified in subsection (a), and the 1 year referred to in paragraph (4) of this subsection, shall be treated as including a period of 18 months beginning with the date of the sale of the old residence.

Petitioners clearly did not meet the requirement of the statute. The time from the sale of the Lewis Bay residence to the time petitioners occupied the Harbor Bluff house as a permanent residence was greatly in excess of eighteen months; to be exact, twenty-three months.

Petitioners' principal argument for confuting the statute is based on equitable considerations. Their position

is that, since the eleven month delay caused by the Environmental Stop Order was not their fault and beyond their control, the statutory period should be extended from eighteen to twenty-nine months.

This argument is doomed by the words of the statute and its legislative and case history. 83 U.S. Code, Cong. & Admin. News 4105-4106, 4742-4743. It is firmly established that Section 1034 prescribes an absolute rule that the gain from the sale of a taxpayer's principal residence can be deferred only if a taxpayer uses his new home as his principal residence within eighteen months of the sale. *United States v. Sheahan*, 323 F.2d 383 (5th Cir. 1963); *Elam v. Commissioner*, 58 T.C. 238 (1972), *aff'd per curiam*, 477 F.2d 333 (6th Cir. 1973); *Bayley v. Commissioner*, 35 T.C. 288 (1960); *Henel v. Commissioner*, 24 T.C.M. 1344 (1965). The rule is based on the general rule of tax code interpretation that statutes granting tax exemptions must be strictly construed. *See Commissioner v. Baertschi*, 412 F.2d 494 (6th Cir. 1969); *Sheahan, supra*, 323 F.2d 383; *Elam, supra*, 58 T.C. 238; *Stolk v. Commissioner*, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964).

Petitioners' second argument seeks to bring them within the wording of Section 1034(a). They contend that, since the Harbor Bluff property was purchased within one year of the sale of their old residence and since Joseph Gelinas was at the House every day from June 7, 1971, to when it was demolished on July 15, the house was "used by the taxpayer as his principal residence" within the eighteen months statutory period, and they are, therefore, entitled to nonrecognition treatment.

Even if we make the extremely dubious assumption that Joseph Gelinas' daytime presence at the Harbor Bluff house for a period of six weeks amounted to a residence

use, 26 U.S.C. § 1034(c) effectively negates this approach. It specifically provides that when a taxpayer purchases more than one new residence within the exemption time period, "the last of such residences . . . shall constitute the new residence." It is clear that the Blackberry Lane house was the last principal residence purchased by the taxpayers within the eighteen months statutory period.

Affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.77-1398

JOSEPH T. AND MARIE T. GELINAS,
Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

MEMORANDUM AND ORDER

Entered February 6, 1978

ON PETITION FOR REHEARING

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.

In consideration of the petition for rehearing, our opinion is amended as follows:

(a) The third and fourth sentences in the first full paragraph on page three are deleted and there is inserted in their place the following sentence. "Mr. Gelinas moved into the Harbor Bluff house on June 7 and was there day and night until July 15 so as to work on the reconstruction and design." [Correction (a) appears in Appendix A, p. 11, first ¶, 6th line.]

(b) Strike the word "daytime" from the second line of the last paragraph on page six. [Correction (b) appears in Appendix A, p. 14, last ¶, 2d line.]

We do not feel that the day and night presence of Mr. Gelinas at the Harbor Bluff house between June 7 and July 15, 1971, can overcome the provisions of 26 U.S.C. § 1034(c).

The petition for rehearing is denied.

By the Court,

DANA H. GALLUP, Clerk

By: /s/ Francis P. Scigliano
Chief Deputy Clerk

Appendix C.

T. C. Memo. 1976-103

UNITED STATES TAX COURT

JOSEPH T. GELINAS and MARIE T. GELINAS,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 1879-75.

Filed March 31, 1976.

Joseph T. Gelinas, pro se.

J. O. Tannenbaum, for the respondent.

MEMORANDUM OPINION

SCOTT, *Judge*: Respondent determined a deficiency in petitioners' Federal income tax for the calendar year 1971 in the amount of \$36,288.43.

Some of the issues raised by the pleadings have been disposed of by agreement of the parties, leaving for our decision only whether petitioners are entitled under section 1034, I.R.C. of 1954,¹ to defer the gain realized on the sale of their principal residence when they were unable to actually occupy their newly constructed residence within 18 months after the sale of their old residence because construction of the new residence was delayed by a Stop Order issued by an agency of the state government.

All of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife, who resided in Hyannis, Massachusetts at the time of the filing of the petition in

¹ All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise noted.

this case, filed a Joint Federal income tax return for the calendar year 1971 with the Director, Internal Revenue Service Center, Andover, Massachusetts.

On June 7, 1971, petitioners sold real property located on Lewis Bay in Hyannis, Massachusetts to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. The property consisted of a motel, a boat landing, and petitioners' personal residence. Of the total amount of \$1,200,000 received for the entire property, the amount of \$160,000 was for petitioners' residence. This property had been petitioners' personal residence since 1961. Their adjusted basis in the residence as of the date of sale was \$25,200. Of the total expenses of \$57,600 incurred by petitioners on sale of the property, the amount of \$7,660.80 was applicable to their personal residence.

On June 7, 1971, petitioners purchased real property on Harbor Bluff Road in Hyannis, Massachusetts with the intention of constructing a new principal residence thereon. There was a 26-year-old habitable building located on the property when petitioners acquired it. This building, which had town sewer connections and utility services, was demolished on July 15, 1971. On August 20, 1971, petitioners obtained a building permit from the Town of Barnstable, Massachusetts for the construction of their new residence. Since petitioners' new residence was to be built close to the shoreline, construction of a reinforced concrete seawall was necessary before building of the residence could commence. On September 1, 1971, petitioners' contractor began construction of the seawall. After complaints of property owners in the immediate vicinity were received, the Director of Marine Fisheries, Department of Natural Resources, Commonwealth of Massachusetts, issued a Stop Order on September 30, 1971, requiring work on the seawall to be discontinued. On October 3, 1971, petitioners' contractor was arrested for alleged digging in a marsh

area in violation of the Wet Lands Act of the Commonwealth of Massachusetts. After trial in the spring of 1972, the contractor was found not guilty of all charges by the Barnstable First District Court, Commonwealth of Massachusetts. On August 21, 1972, following the acquittal of the contractor, the Suffolk County Superior Court, Commonwealth of Massachusetts, held in favor of petitioners in their contest with the Director of Marine Fisheries and voided the Stop Order issued by that Director. On August 28, 1972, petitioners received from the Director of Marine Fisheries a permit enabling construction of the seawall and residence to continue. On September 5, 1972, petitioners' contractor resumed construction of the seawall and the new residence with the intent of completing the construction contract by December 5, 1972. The construction was not completed by December 5, 1972, and petitioners did not occupy the new residence as their principal residence until on or about May 31, 1973. The final cost of the new residence was \$165,000.

Petitioners were permitted to continue to reside in their residence on Lewis Bay in Hyannis, Massachusetts until March 24, 1972, when they acquired another residence located on Blackberry Lane in Hyannis, Massachusetts at a total cost of \$51,509.11.

On Form 2119, Sale or Exchange of Personal Residence, which was attached to petitioners' income tax return for the calendar year 1971, petitioners show a selling price of their old residence of \$160,000, a basis of this residence of \$25,200, and a gain from the sale of \$134,800. They reported the cost of the new residence as \$165,000, no amount of the gain as taxable, and the gain to be deferred as \$134,800.

Respondent determined that gain in the amount of \$50,415.05 on the sale of petitioners' old residence might not be deferred under section 1034 because petitioners did not

occupy their new residence within 18 months after the date of the sale of their old residence.²

Section 1034(a) of the I.R.C. of 1954,³ as applicable to the year 1971, provides that if property used by a taxpayer as his principal residence is sold by him and within a period beginning one year before the date of such sale and ending one year after the date of such sale a new residence is purchased and "used" by the taxpayer as his principal residence, gain from the sale of the old residence shall be recognized only to the extent that the taxpayer's adjusted sales price of the old residence exceeds the cost of purchasing the new residence. Section 1034(c)(5)⁴ provides that in the case of a new residence, the construction

² This amount of gain on the sale of the old residence which respondent determined might not be deferred was computed after allowing petitioners to defer the amount applicable to the residence they had purchased on Blackberry Lane in Hyannis, Massachusetts and moved into on March 24, 1972.

³ SEC. 1034. SALE OR EXCHANGE OF RESIDENCE.

(a) Nonrecognition of Gain. — If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

⁴ SEC. 1034. SALE OR EXCHANGE OF RESIDENCE.

• • •

(c) Rules for Application of Section — For purposes of this section:

• • •

(5) In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period specified in subsection (a), * * * shall be treated as including a period of 18 months beginning with the date of the sale of the old residence.

of which is commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period allowed for the taxpayer to use the new residence as his principal residence shall be 18 months from the date of the sale of the old residence.

Petitioners take the position that since the construction of their new residence was delayed for a period of 11 months by the action of an agency of the Commonwealth of Massachusetts, the 18-month period permitted by the statute for their occupancy of the new residence should be extended by 11 months. They, in effect, argue that they should not be penalized because of actions of a state government which were held by the courts to be unjustified.

In *John F. Bayley*, 35 T.C. 288, 295-297 (1960), we reviewed the legislative history of section 1034 and concluded that in order to meet the requirements of nonrecognition of the gain on the sale of an old residence because of construction of a new residence the new residence must be actually occupied within 18 months after the sale of the former residence. We quoted from the Senate Finance Committee Report No. 791, 82d Cong., 1st Sess. (1951), 1951-2, C.B. 458, 483, explaining the provision of section 112(n) of the 1939 Code (section 303 of the Revenue Act of 1951), the predecessor of section 1034, placing emphasis on the statement therein that the "requirement of occupancy within 1 year" appeared not to be realistic in case of construction of a new dwelling and from the Joint Committee Staff Summary of Provisions of the Revenue Act of 1951, 1951-2 C.B. 287, 309, emphasizing the words "he occupies it" (the newly constructed residence) within 18 months after the sale of his former residence. We concluded that " * * * the statute and the regulations in the light of the Congressional committee reports" require that "a new residence must be lived in or physically occupied, on or prior to the post-sale deadline date." In that case

we pointed out that we recognized the equity of the taxpayers' position and their intent and diligent attempt to meet the statutory requirements for nonrecognition of the gain from the sale of their old residence. However, we expressed the view that the equities could not change the clear statutory provision where " * * * Congress, for reasons satisfactory to it, has established a fixed 18-month period within which such requirements must be met * * * ".

In *United States v. Sheahan*, 323 F. 2d 383, 387, (5th Cir. 1963), the Court quoted at length from our opinion in the *John F. Bayley* case, *supra*, and concluded, as we had, that even though a taxpayer, in good faith, intended to occupy the new house as his principal residence within the time permitted by statute, the nonrecognition of gain on the sale of the old residence must be disallowed as a matter of law where he did not in fact physically occupy or live in the new residence on or before the expiration of the period provided in the statute.

In *Nelson C. Elam*, 58 T.C. 238 (1972), *affd. per curiam* 477 F. 2d 1333 (6th Cir. 1973), we held that a taxpayer who sold his old residence with the intention of completing construction of a new residence within the 18-month period, but in fact within that period only completed the guest house on the new property, was entitled to defer gain on the old residence only to the extent of the cost of the guest house which was actually occupied within the 18-month period. In that case we stated at 240:

Section 1034 manifestly is not designed to require the offsetting of the adjusted sales price of the old residence by the construction costs of the new residence regardless of the time incurred, which could be perhaps several years after the date of sale. Rather, the plan of the statute is to accord tax deferral only if the proceeds of sale can be reinvested in the new

residence within a relatively short period of time — generally 1 year. Congress has provided an additional 6-month grace period if the taxpayer builds or reconstructs the new residence.

The cases further tell us that the event we are to look for during the relevant period is the placing of the new residence into *use* as a residence. *John F. Bayley*, 35 T.C. 288, 295 (1960); *United States v. Sheahan*, 323 F. 2d 383 (C.A. 5, 1963); *William C. Stolk*, 40 T.C. 345 (1963), affirmed per curiam 326 F. 2d 760 (C.A. 2, 1964). The statute provides the additional precision that if more than one residence is purchased, the one last used as a principal residence during the period is deemed the statutory new residence. Sec. 1034(c)(4) and (5). The facts reveal that petitioners were using the guesthouse as a residence by February 1967. Whether or not the main house would have constituted a second principal residence had it been completed and occupied by that date is a question we do not have to decide today.

Petitioners here contend that there is greater equity in their position than existed in the cases we have previously decided since the Stop Order put on their construction work by an agency of the Commonwealth of Massachusetts was an act beyond their control. This interference with construction, though different in nature from bad weather or illness of the taxpayer commencing immediately after the sale of the old residence, is no more beyond the control of the taxpayer than are these other occurrences. As we pointed out in *John F. Bayley*, *supra*, and the Circuit Court pointed out in *United States v. Sheahan*, *supra*, the statute is clear and must control even though a taxpayer has made a good faith attempt to comply with its terms but failed.

Petitioners finally argue that the fact that section 1034(c) was amended by P.L. 94-12, section 207(a) and (b), to substitute in section 1034(c)(5) "2 years" for "18 months" indicates that Congress considered 18 months too short a period to require completion of construction of the new residence. However, as petitioners recognize this change is effective only for residences sold or exchanged after December 31, 1974, in taxable years ending after that date. Had Congress considered the 18-month period provided in section 1034(c)(5) too short a period for years prior to the calendar year 1975, it could have made the change in the provision retroactive. It did not do so. As the Court pointed out in the *Sheahan* case, *supra* at 385, whether the purpose of a tax statute is remedial or punitive, "the words of the statute must be given their ordinary meaning and they must be construed in harmony with the statute as an organic whole." Since in section 1034 the word "use" of a property as a principal residence means living in or occupying the residence, a taxpayer who does not actually live in or occupy the new residence within the period of time provided in the statute applicable to the year involved in his case is not entitled to nonrecognition of gain on the sale of his old residence under section 1034.

Because of stipulated adjustments,

*Decision will be entered
under Rule 155.*

Appendix D.

UNITED STATES TAX COURT
WASHINGTON

Docket No. 1879-75.

JOSEPH T. AND MARIE T. GELINAS
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT.

MEMORANDUM SUR ORDER

On March 1, 1976 the above-entitled case was called for trial at Boston, Massachusetts. Petitioners were not represented by counsel but petitioner, Joseph T. Gelinas, appeared in person. The parties filed a stipulation of facts and an opening statement was made by Mr. Gelinas and by respondent's counsel. Mr. Gelinas represented to the Court that he had no evidence to offer other than the stipulated facts.

On March 31, 1976 the Opinion of the Court in this case was filed, with decision to be entered under Rule 155. Respondent filed his Computation for Entry of Decision, which was set for hearing. The hearing was continued and prior to the date the hearing on respondent's computation was to be held petitioners' Motion to Reopen Record was filed. The ground upon which petitioners based their motion is that all pertinent facts in the case were not placed in the record in the stipulation of facts because petitioners were not represented by counsel when the stipulation was filed.

Whether, under any circumstances, the Court would be justified in reopening a record merely because petitioners

were not represented by counsel at the trial, we need not decide. In this case, after considering the facts petitioners now contend could be established, we are of the opinion that were the facts established as stated in petitioners' motion and amplified at oral argument, the conclusion in the Opinion filed March 31, 1976 would not be changed. Therefore, no useful purpose would be served by reopening the case, even if petitioners had assigned adequate reasons for requesting such a reopening.

The facts which petitioners state were not present at the original hearing, and which they now seek to prove, are the following.

Immediately after petitioners purchased the real estate on Harbor Bluff Road, Hyannis, Massachusetts, with a house thereon with all utilities connected thereto, for the amount of \$44,000, Mr. Gelinas moved into the premises. The house had been a summer home and had furnishings in it. Petitioners did not move the furnishings from the home they sold on Lewis Bay, Hyannis, Massachusetts and Mrs. Gelinas continued to reside in that home. The real estate and house purchased on Harbor Bluff Road was approximately one-half mile from the property petitioners had sold on Lewis Bay. Mr. Gelinas moved into the house on the property purchased in order to have the view of the bay from that house and to keep an eye on his 135-foot boat, which he had anchored in front of the Harbor Bluff Road house, and to assist in designing the rebuilding or remodeling of the house. Mr. Gelinas' original intention was not to tear the house down completely and build a new one, but to leave a portion of the back of the old house and build a new house around that portion. In the course of tearing down the part of the house to be demolished, certain damage was done to the part Mr. Gelinas intended to remain standing and the entire house was demolished on July 15, 1971. Thereafter Mr. Gelinas returned to

occupy the house on Lewis Bay, where Mrs. Gelinas had remained and from which none of their furniture had been removed. On March 24, 1972 petitioners acquired a residence located on Blackberry Lane, Hyannis, Massachusetts at a cost of \$51,509.11. When petitioners acquired the house on Blackberry Lane they intended the house to be the permanent home of their daughter and her family. However, petitioners moved from the Lewis Bay house into the Blackberry Lane house and lived in the Blackberry Lane house until about March 31, 1973, when they moved into their newly constructed house on Harbor Bluff Road. Petitioners' daughter and her family occupied the house on Blackberry Lane with petitioners.

Accepting the above facts as being proved in this case, our conclusion as set forth in our Opinion filed March 31, 1976 will not be changed. In our view Mr. Gelinas' living in the summer place on the new property while Mrs. Gelinas and their furniture remained in their home at Lewis Bay does not constitute petitioners' occupying the property on Harbor Bluff Road as their principal residence. However, even if Mr. Gelinas could be considered as occupying the property on Harbor Bluff Road as his principal residence, he moved from that residence on July 15 back to the Lewis Bay residence and again occupied the Lewis Bay residence as his principal residence. The total investment which had been made in the residence on Harbor Bluff Road as of July 15, when Mr. Gelinas moved from that residence, was the \$44,000 that had been paid for the purchase of the property. On March 24, 1972, Mr. and Mrs. Gelinas moved into a new residence which they purchased on Blackberry Lane for \$51,509.11. They occupied this property as their principal residence for over a year and did not sell the property when they moved from it.

Under these facts and for the reasons set forth in the Opinion filed March 31, 1976, the conclusion we reached would not be changed if the record were reopened to permit petitioners to attempt to establish the facts we have recited.

*An appropriate order
will be issued.*

UNITED STATES TAX COURT
WASHINGTON

Docket No. 1879-75.

JOSEPH T. AND MARIE T. GELINAS

PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ORDER

By order dated November 12, 1976, the hearing on respondent's Computation for Entry of Decision under Rule 155 filed on June 3, 1976, was continued until after disposition of petitioners' Motion to Reopen Record. That motion having been denied on March 16, 1977, it is

ORDERED: That respondent's Computation for Entry of Decision filed on June 3, 1976, is hereby calendared for hearing at the Motions Session of the Court beginning at 10:00 a.m. on May 4, 1977, in Tax Court Courtroom, Third Floor, 400 Second Street, N.W., Washington, D.C., and if objection thereto, accompanied by an alternative computation, is not filed at least 5 days prior to that date or any continuance thereof, the Court may enter a decision in accord with respondent's computation. If counsel for petitioners files a written concurrence to the entry of decision based upon respondent's computation, this case will be stricken from the calendar for the date indicated above and the Court will thereupon enter its decision without further action or appearance by either party.

(Signed) Irene F. Scott
Judge.

Dated: Washington, D.C.
March 22, 1977

Appendix E.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 1879-75.

JOSEPH T. AND MARIE T. GELINAS

PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion filed March 31, 1976, respondent filed a computation for entry of decision under Rule 155 on June 3, 1976, to which petitioners neither acquiesced nor filed an objection. After due notice to the parties, respondent's computation under Rule 155 was called for hearing on the Motions Session of the Court on May 4, 1977, at which time respondent was represented by counsel and there was no appearance by or on behalf of petitioners. After due consideration, the facts recited in respondent's computation are incorporated herein as the findings of the Court, and it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1971 in the amount of \$36,288.43.

(Signed) Irene F. Scott
Judge.

Entered: May 6, 1977

Appendix F.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF NATURAL RESOURCES
100 CAMBRIDGE STREET
BOSTON 02202

G.L. c. 130 § 27A

STOP ORDER

FILE NUMBER: DF-702 PROJECT LOCATION:
Barnstable

TO: Joseph & Marie Gelinas
145 School Street CERT. MAIL NO.: 332140
Hyannis, Massachusetts

RE: NOTICE OF INTENT AND PLANS DATED: Sep-
tember 18, 1971

Under the provisions of G.L. c. 130 § 27A, the Director of Marine Fisheries has determined that the area described in your notice and plans submitted therewith contains shellfish or is necessary to protect marine fisheries. Therefore, the Director of Marine Fisheries issues this Order:

1. Pending further review of the proposed project by marine biologists, the work described in said notice and plans shall not take place unless and until the Director of Marine Fisheries shall issue a permit allowing said work.
2. This Order does not relieve any person of the necessity of complying with other applicable federal, state and/or local statutes, by-laws, or regulations.

The Office of Resource Review of the Department of Natural Resources is available to answer questions regarding this matter. Telephone 617-727-3171.

PREPARED BY:**ISSUED BY:**/s/ Joel A. Lerner/s/ Frank Grice

Joel A. Lerner Director (Acting)
Div. of Conservation Services

Frank Grice Director
Div. of Marine
Fisheries

APPROVED:/s/ Cornelius J. Foley

Cornelius J. Foley Commissioner (Acting)

On this 30th day of September, 1971, before me personally appeared FRANK GRICE to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ Silvio Ferrante My commission expires: Aug. 6, 1976
Notary Public

Appendix G.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS
NO. 94061

SUPERIOR COURT
IN EQUITY

FRANK GRICE
VS.

JOSEPH T. GELINAS
FINAL DECREE DISMISSING BILL.

This cause came on to be further heard at this sitting, and by Court approval and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED that the bill be and hereby is dismissed.

By the Court, (Brognia, J.)

/s/ Rita L. Dunlop

Clerk

Entered August 21, 1972

Assented to:

FRANK GRICE, as he is the Director of the Division of Marine Fisheries of the Dept. of Natural Resources of the Commonwealth of Massachusetts

By his attorney,

ROBERT H. QUINN, Attorney General

By /s/ Alan G. MacDonald

ALAN G. MACDONALD

Assistant Attorney General

JOSEPH T. GELINAS

By his attorney,

/s/ John W. Spillane

390 Main Street

Worcester, Mass.

Appendix H.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 1034. SALE OR EXCHANGE OF RESIDENCE.

(a) Nonrecognition of Gain.—If property (in this section called “old residence”) used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called “new residence”) is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer’s adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer’s cost of purchasing the new residence.

• • •

(c) *Rules for Application of Section.*—For purposes of this section:

• • •

(2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer’s cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).

• • •

(4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his *principal residence* at some time within 1 year after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence.

(5) In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period specified in subsection (a), and the 1 year referred to in paragraph (4) of this subsection, shall be treated as including a period of 18 months beginning with the date of the sale of the old residence.

1.1034-1(b)(7)

"Cost of purchasing the new residence" means the total of all amounts which are attributable to the acquisition, construction, reconstruction, and improvements constituting capital expenditures, made during the period beginning 18 months (one year in the case of a sale of an old residence prior to January 1, 1975) before the date of sale of the old residence and ending either (i) 18 months (one year in the case of a sale of an old residence prior to January 1, 1975) after such date in the case of a new residence purchased but not constructed by the taxpayer, or (ii) two years (18 months in the case of a sale of an old residence prior to January 1, 1975) after such date in the case of a new residence the construction of which was commenced by the taxpayer before the expiration of 18 months (one year in the case of a sale of an old residence prior to January 1, 1975) after such date (section 1034(a), (c)(2) and (c)(5)

1.1034-1(c)(3)

Property used by the taxpayer as his principal residence.

(i) Whether or not property is used by the taxpayer as his residence, and whether or not property is used by the taxpayer as his principal residence (in the case of a taxpayer using more than one property as a residence), depends upon all the facts and circumstances in each case, including the good faith of the taxpayer

Appendix I.

Ann. Laws of Massachusetts, Chapter 130:

§ 27A. *Removal, Filling and Dredging of Certain Areas Bordering on Coastal Waters of Commonwealth.*

No person shall remove, fill or dredge any bank, flat marsh, meadow or swamp bordering on coastal waters without written notice of his intention to so remove, fill or dredge to the board of selectmen in a town or to the appropriate licensing authority in a city, to the state department of public works, and to the director of marine fisheries. Said notice shall be sent by registered mail at least thirty days prior to any such removing, filling or dredging. The selectmen or, in the case of a city, the licensing authority, shall hold a hearing on said proposal within twenty days of the receipt of said notice * * *. The selectmen or licensing authority, as the case may be, may recommend the installation of such bulkheads, barriers or other protective measures as may protect the public interest and shall transmit forthwith to such person, the director and the department of public works a copy of any such recommendations. If the department of public works finds that such proposed removing, filling or dredging would violate the provisions of sections thirty and thirty A of chapter ninety-one, it shall proceed to enforce the provisions of said sections. If the area on which the proposed work is to be done contains shellfish or is necessary to protect marine fisheries, the said director may impose such conditions on said proposed work as he may determine necessary to protect such shellfish or marine fisheries, and work shall be done subject thereto.

Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both,

and the superior court shall have jurisdiction in equity to restrain a continuing violation of this section.

Acts and Resolves of Massachusetts 1972.

Chapter 784. *An Act Relative to the Protection of Wetlands.*

Section 2. Section twenty-seven A of chapter one hundred and thirty of the General Laws is hereby repealed.